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Nos. 98-1242, 98-1243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MULL & MULL, PLC,
Petitioner,
v.
RHÔNE-POULENC RORER INC., *et al.*,
Respondents.

ROY G. SPECE, JR. and ROSE MARIE IBANEZ,
Petitioners,
v.
RHÔNE-POULENC RORER INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certain plaintiffs' attorneys who supported a nationwide class settlement prior to the final district court judgment that approved the settlement, and who did not appeal that final judgment, may, on collateral attack, seek to have the settlement declared void so that they can evade the explicit provision of the settlement agreement governing attorneys' fees?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

The parent company of Rhône-Poulenc Rorer Inc. ("RPR Inc.") is Rhône-Poulenc S.A. All subsidiaries of RPR Inc. are wholly owned.

The parent company of Armour Pharmaceutical Company ("Armour") is Rhône-Poulenc Rorer International (Holdings) Inc. All subsidiaries of Armour are wholly owned.

The parent company of Bayer Corporation is Bayer A.G. Schein Pharmaceutical, Inc., Onyx Pharmaceuticals, Inc., Millenium Pharmaceuticals, Inc., and Myriad Genetics, Inc. are nonwholly-owned subsidiaries of Bayer Corporation.

Baxter Healthcare Corporation's ("Baxter Healthcare") parent company is Baxter International, Inc. Baxter owns stock in certain publicly-traded companies and is filing this information under seal with the Clerk of the Court.

The parent company of Alpha Therapeutic Corporation ("Alpha Therapeutic") is Green Cross International, Inc. Business Travel Specialists, Inc., G.C. Pharmaceutical (Singapore) Ptc Ltd., Grifols UK Ltd., and Grifols Italia, SpA, are nonwholly-owned subsidiaries of Alpha Therapeutic.

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RESPONDENTS' BRIEF IN OPPOSITION

To make the procedural posture of this case clear:

The petitions challenge a final class settlement that has already paid $596.7 million—free of most government, health insurer, and attorney claims—to 5,967 hemophiliacs who claim that they contracted HIV from the plasma

therapies used to treat their bleeding disorder, the families of these hemophiliacs, and their estates. Petitioners are *not* dissatisfied class members seeking to challenge that settlement. Rather, petitioners are a few dissident plaintiffs' attorneys who admit that they deliberately withheld their present objections to the class settlement until the judgment was final and respondent fractionators [1] were obligated to pay class members. Opp. App. 51a.[2] Petitioners then launched this collateral attack in order to evade a key provision of the settlement, which established a $40 million cost and fee fund to be the exclusive source of compensation for plaintiffs' attorneys.

Petitioners Mull & Mull, Roy Spece, and Rose Ibanez want this Court to declare void the final judgment that certified the settlement class and approved the settlement, so that they can seek, through satellite lawsuits filed in state court, attorneys' fees above and beyond those provided in the class settlement. To rationalize their attack on the class settlement, in which many of their own clients are participating, petitioners propose the fiction that fractionators made thousands of irrevocable individual settlement offers when, pursuant to the terms of the class settlement agreement, fractionators mailed release forms to class members.

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[1] "Fractionation" is the process by which blood plasma is separated into its derivatives. Fractionators are Armour Pharmaceutical Co., Bayer Corp., Baxter Healthcare Corp., and Alpha Therapeutic Corp. Also named as a defendant is Rhône-Poulenc Rorer Inc., the indirect parent corporation of Armour.

[2] To support their Counter Statement of the Case, which differs significantly from that presented by petitioners, fractionators have reproduced certain key materials in the appendix to this brief ("Opp. App.") and have lodged with the Clerk of the Court copies of fractionators' appendix to their brief in the court of appeals ("FA"), which reproduces additional settlement documents and excerpts from the record of this case.

Both the district court and the court of appeals rejected petitioners' contorted theories. Both courts held that the district court had jurisdiction to enter judgment approving the class settlement and declined to declare that final judgment void based on this Court's subsequent decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997). And both courts arrived at the unremarkable conclusion that attorneys cannot pretend to support a final judgment that approves a class settlement and later attack that settlement in a bid for higher fees.

There is nothing about those holdings that is remotely worthy of review. No decision of this or any other court has allowed attorneys to engage in the cynical procedural gamemanship being pursued by petitioners. Nothing in the Article III or Rule 23 decisions upon which petitioners rely supports their attack on a final judgment that is benefiting thousands of persons. And, as demonstrated below, nothing in the record of this case points to any gross impropriety in the settlement warranting intervention by this Court to consider facts unique to this litigation.

COUNTER STATEMENT OF THE CASE

1. Hemophilia is an incurable bleeding disorder caused by deficiencies of certain clotting factors in the blood. It is treated by administering the missing clotting factors to the patient. In the late 1960s and early 1970s, fractionators developed freeze-dried clotting factor concentrates that resulted in "the return to a full range of activities for many patients who were previously wheelchair-bound" and, between 1968 and 1983, a doubling in the life expectancy of persons with hemophilia. FA 904.

The advent of the disease now known as AIDS had a tragic impact on persons with hemophilia. The first cases

of the disease were reported in June and July of 1981 in homosexual men. FA 897, 899. A year later, AIDS-like symptoms were first reported in three persons with one form of hemophilia. FA 902. But it was not until 1984 that: (a) the medical community reached a consensus that AIDS was transmissible by blood; (b) scientists identified the retrovirus now called HIV and known to be the cause of AIDS; and (c) the Centers for Disease Control demonstrated that HIV was inactivated by heat-treatment processes that had recently been approved to inactivate hepatitis in certain factor concentrate. *In re Rhône-Poulenc Rorer Inc. ("RPR")*, 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995); FA 923. The following year, the first blood screening test to detect antibodies to HIV was licensed. *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048, 1052 (D.D.C. 1987), *aff'd in part and vacated in part*, 851 F.2d 437 (D.C. Cir. 1988).

These discoveries came too late for many persons with hemophilia. About 50 percent of the hemophiliacs who used factor concentrates between 1978 and 1985 were infected with HIV, most before January 1983. FA 915. Thus, before anyone knew that AIDS was transmissible by blood and plasma products, thousands of people with hemophilia had already been infected. *See RPR*, 51 F.3d at 1296.

2. More than 350 lawsuits have been filed in state courts and approximately 230 have been filed in federal courts alleging HIV transmission through factor concentrate. In late 1993, all pending federal factor concentrate cases were consolidated in the Northern District of Illinois before Judge John F. Grady. *In re Factor VIII & IX Concentrate Blood Products Prod. Liab. Litig. (MDL-986)*, 853 F. Supp. 454, 456 (J.P.M.L. 1993). Thomas Mull—a name partner in petitioner Mull & Mull—was

among the attorneys named to Plaintiffs' Steering Committee ("PSC"). FA 210-18.

In late 1994, the district court certified a nationwide "issue" class for the purpose of determining whether the fractionators were "guilty of ordinary negligence." *Wadleigh v. Rhône-Poulenc Rorer,* 157 F.R.D. 410, 426 (N.D. Ill. 1994). The United States Court of Appeals for the Seventh Circuit subsequently issued a writ of mandamus ordering the district court to decertify the class for three reasons: 1) the class trial on the issue of negligence would irreparably injure fractionators by placing upon them unfair pressure to settle; 2) the district court's plan to give the jury "a kind of Esperanto instruction" did not reflect the nuances in the negligence law of any jurisdiction; and 3) the bifurcated trial procedure proposed by the district court would violate the Seventh Amendment because issues that would be determined in the negligence "issue" trial overlapped wtih issues that would be determined by different juries in the subsequent individual trials. *RPR,* 51 F.3d at 1299, 1303. This Court denied PSC's petition for certiorari, 516 U.S. 867 (1995), and the *RPR* class was decertified. FA 338.

3. On April 19, 1996, fractionators proposed a settlement that would pay up to $100,000 for each HIV-positive hemophiliac who used factor concentrate and for certain persons allegedly infected with HIV through exposure to such hemophiliacs. The total value of this part of the April 1996 settlement proposal was limited to $600 million; if more than the anticipated 6,000 claims were filed, each claimant would be paid less than $100,000. FA 355, 416. Because certain plaintiffs had made settlement demands of $100,000 net of attorneys' fees, *see* FA 361, fractionators proposed the establishment of a separate $40 million fund from which the costs of implementing the settlement would be paid and from which the

district court would award reasonable costs and attorneys' fees to plaintiffs' attorneys. FA 355. PSC rejected fractionators' proposal. FA 353.

After several months of intense negotiations, fractionators and PSC agreed to the present class settlement, in which fractionators agreed to pay $100,000 for each claim, even if the number of claims exceeds 6,000. FA 8 § B; *see also* FA 354-55, 405. The settlement agreement expressly required claimants to execute releases in order to receive payment. FA 41 § M. Fractionators also undertook to pay additional monies to resolve federal and state Medicare and Medicaid claims as well as the claims of most private health insurers, so that claimants would receive the settlement payments free and clear of most outstanding claims. FA 46 § P(1). Finally, the settlement agreement stated that plaintiffs' attorneys would not be entitled to collect fees based upon a percentage of the settlement paid to class members and that the $40 million fund was the exclusive source for all costs and attorneys' fees, which would be awarded by the district court. FA 40-41 §§ L(2) & (5).

4. In August, 1996, PSC sought preliminary certification of a nationwide settlement class in the case of *Walker v. Bayer Corp.*, 96-C-5024 (N.D. Ill.). FA 394-97. Mull was listed as counsel on the *Walker* complaint. FA 393. He attended the hearing at which the district court gave its preliminary approval to the settlement and authorized the issuance of notice to the class. FA 399. Mull did not object to the proposed class settlement. FA 412-13, 429-38. Petitioner Ibanez filed a three-page brief in which she asserted that the $40 million cost and fee fund was insufficient in amount but expressly waived that objection on the understanding that (1) all costs would be paid and (2) "the probable burden of inadequate fees is spread evenly among all the attorneys . . . ." Opp. App. 99a.

Mull was among the plaintiffs' attorneys who moved for final approval of the class settlement. FA 455. After notice issued, the vast majority of persons in the hemophilia community who were entitled to file claims did so. FA 528-29.

On November 25, 1996, the district court held a day-long fairness hearing. Both Spece and Mull were present. FA 519. Neither objected to the class settlement. Mull's comments focused upon a settlement implementation issue —establishment of a trust mechanism so that receipt of the settlement money would not disqualify class members from government entitlements. FA 540-44, 563-68.

The district court did not rule immediately upon the fairness of the settlement because, *inter alia*, fractionators were still negotiating with the United States government, state governments, and dozens of insurers to compromise any claims against settlement monies that would be paid to class members. FA 573-82. Fractionators eventually paid more than $30 million to secure these compromises; each of the agreements with insurers and government entities refers specifically to the class settlement. *E.g.*, FA 156, 176, 194. Working with PSC and the hemophilia community, fractionators also secured the passage of legislation that endorsed the *Walker* class settlement by name and provided that receipt of the $100,000 settlement payment would not affect claimants' eligibility for medical assistance payments. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4735, 111 Stat. 251, 522 (1997).[3]

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[3] Section 4735 provides:

(a) IN GENERAL.—Notwithstanding any other provision of law, the payments described in subsection (b) shall not be considered income or resources in determining eligibility for, or the amount

On May 6, 1997, a second fairness hearing was held. In correspondence prior to the hearing, Mull argued that class members should be given a new opportunity to opt out of the settlement based on purported newly discovered evidence, but he did not challenge certification of a settlement class or assert that the settlement was unfair. FA 640, 667. At the hearing, a Mull colleague made the same argument. FA 612. He also complained of alleged fraud on the part of fractionators and PSC. FA 634-35. However, Mull's colleague expressly stated that he was not asking the court to reject the settlement. FA 630, 685; Pet. App. 69-70. Robert Arceneaux, Mull's attorney, also appeared and stated that he did not object to certification of the settlement class or final approval of the class settlement. FA 677-80.

The district court concluded that Mull *et al.* had not identified any new evidence or colorable basis for their fraud allegations and refused to reopen the opt-out period.

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of benefits under, a State plan of medical assistance approved under title XIX of the Social Security Act.

(b) PAYMENTS DESCRIBED.—The payments described in this subsection are—

(1) payments made from any fund established pursuant to a class settlement in the case of Susan Walker v. Bayer Corporation, et al., 96-C-5024 (N.D. Ill.); and

(2) payments made pursuant to a release of all claims in a case—

(A) that is entered into in lieu of the class settlement referred to in paragraph (1); and

(B) that is signed by all affected parties in such case on or before the later of—

(i) December 31, 1997, or

(ii) the date that is 270 days after the date on which such release is first sent to the persons (or the legal representative of such persons) to whom the payment is to be made.

FA 701-06; Pet. App. 69-70.[4] Thereafter, the district court removed Mull from PSC. FA 709.

5. On May 8, 1997, the district court entered final judgment certifying the settlement class, approving the class settlement, and ordering the parties to implement the settlement agreement according to its terms. Pet. App. 78-80. The court held that the cost and fee provision of the settlement, which created a separate $40 million fund from which reasonable attorneys' fees were to be paid, was fair and reasonable to the class, but the court reserved decision regarding the payment of such costs and fees. Pet. App. 79-80. The court entered final judgment pursuant to Fed. R. Civ. P. 54(b), and reserved exclusive jurisdiction for purposes of supervising implementation of the settlement and allocation of fees. Pet. App. 80. (As of this date, some claims for attorneys' fees have been paid from the fund, but the district court has yet to rule upon petitioners' principal claims for fees and has not awarded fees to PSC.)

Two appeals were filed by nonparty class members, but were voluntarily dismissed. FA 710-13; *Dowling v. Alpha Therapeutic Corp.*, No. 97-2410 (7th Cir., appeal dismissed July 16, 1997); *Otis v. Bayer Corp.*, No. 97-2556 (7th Cir., appeal dismissed July 24, 1997).[5]

6. Six weeks after the judgment approving the class settlement was final, this Court decided *Amchem Prods.*,

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[4] The district court did provide that individual class members would be allowed to opt out if they showed "exceptional circumstances" supporting their untimely request. FA 709a-c.

[5] Fractionators initially moved to dismiss the appeals on the ground that appellants lacked standing. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457-58 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1337 (1998). Thereafter, the parties and the putative appellants agreed that the putative appellants could opt out of the class.

Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (June 25, 1997). Within days, fractionators received a letter from Arceneaux (a) stating that he and Mull had filed competing class actions in Louisiana state court, (b) suggesting that a class settlement "may not now be available" in federal court, and (c) proposing a state court class settlement with Mull and Arceneaux as plaintiffs' counsel to solve "issues that are now subject to great uncertainty." FA 714-15.

On August 15, 1997, Mull wrote to fractionators asserting that *Amchem* "threatens the legitimacy of this settlement as a 'class' " but stating that his clients wanted to accept fractionators' settlement offer. FA 716-17. He then requested that settlement checks be prepared with his name and that of a colleague as co-payees with his clients. FA 716. This request appeared to conflict with the settlement agreement, which provided that attorneys were not entitled to any percentage of the settlement monies paid to class members. FA 37-38 § L(2). Mull also stated that his firm was asserting a lien against the cost and fee fund. FA 717.

Mull, Spece, and Ibanez subsequently filed purported liens against not only the cost and fee fund, but against fractionators' assets generally. FA 718-21, 869-77.[6] When fractionators moved to enforce the fee provisions of the settlement agreement, petitioners challenged the validity of the settlement. FA 722-23, 731-32, 791-92; Pet. App. 16-17.

Petitioners asserted that the class settlement was a nullity and that fractionators instead had made 6,000 individual settlement offers to pay $100,000, net of attor-

[6] Petitioners later recharacterized the putative liens against fractionators' corporate assets as causes of action that they would pursue in separate litigation. Opp. App. 17a.

neys' fees, to class members. Pet. App. 17; Opp. App. 5a, 20a, 22a-23a. According to petitioners, for each individual settlement offer that was accepted, fractionators had to pay an additional $50,000 or more to complaining attorneys.[7]

On January 6, 1998, Mull filed in Louisiana a lawsuit asserting that fractionators had tortiously interfered in the contingent fee contracts between Mull & Mull clients by, *inter alia*, directly communicating with Mull clients, attempting to limit Mull's fee recovery to the $40 million cost and fee fund, and attempting to compel the district court to abrogate Mull's contingent fee contracts. Pet. App. 106-23. The complaint sought not only the alleged fees, but also punitive damages. Pet. App. 122-23.

On January 7, 1998, the parties appeared before the district court. Counsel for Mull & Mull told the district court that the firm never intended to abide by the fee provisions of the class settlement:

> MR. ARCENEAUX: [T]he point is Mull & Mull could not have attacked the settlement without incurring some problem with the clients that it had that wanted to opt in. So it made the conscious election relying upon federal jurisprudence, since it had not been cited, it had not been served, it had not been named as a defendant or a class member, that if it stood by and let this class be certified, if certification became a problem for it, that at the appropriate time, it would have the absolute right under federal law to raise whatever issues it needed to raise when

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[7] Since Mull & Mull had a 33% contingent fee arrangement with certain clients, that firm contends that fractionators' $100,000 payment to each settling Mull client obligated fractionators to pay $50,000 to Mull. Since Mull claims to represent 318 claimants, the firm seeks more than $16 million in attorneys' fees. Spece and Ibanez seek $66,000 per claimant, based on a 40% contingent fee contract. *See* FA 741-42; Opp. App. 82a.

it was appropriate to defend its rights and its own clients' rights were no longer in jeopardy. That is the reality.

THE COURT: So you are saying that they had the intent all along, Mr. Mull had the intent all along to challenge the settlement once it had been effected?

MR. ARCENEAUX: They had the intent all along to collect their contingent fees.

Opp. App. 51a. The Mull firm stated its intention to file additional lawsuits in other courts relating to Mull's fee demands. Opp. App. 16a-17a, 94a. Spece and Ibanez asked the district court to award them compensatory and punitive damages for fractionators' supposedly tortious conduct with respect to fees and indicated that they too might file additional lawsuits related to the class settlement. Opp. App. 67a; FA 802-03. The court warned petitioners that it was considering enjoining them from pursuing any such litigation. Opp. App. 94a-95a.

On February 18, 1998, the district court granted fractionators' motion to enforce the attorneys' fees provisions of the class settlement. Pet. App. 11-29. The court ruled that complaining attorneys were (a) bound by the settlement, which superseded contingent fee contracts, and (b) estopped from attacking the class settlement now. Pet. App. 19-21, 28-29. The court held that the judgment approving the class settlement was final prior to the *Amchem* decision, and reiterated that the settlement did not present the problems raised in *Amchem*. Pet. App. 18-19. Specifically, the district court observed that "[t]he considerations which prompted the Supreme Court to set aside the judgment in *Amchem*—primarily the lack of any genuine adversarial process and the lack of any guarantee of fair representation of absent class members—are simply not present here." Pet. App. 19. The court also rejected petitioners' claims that the releases constituted 6,000 individual offers to settle that superseded any class settlement and that the releases deviated from the terms of the

settlement agreement. Pet. App. 22-26. Finally, the district court held that the liens asserted by petitioners were invalid and enjoined petitioners from pressing their demand for fees related to the class settlement before any other court. Pet. App. 26-29. Mull, Spece, and Ibanez appealed.

With the assent of the district court, fractionators had deferred making settlement payments to petitioners' clients while the district court considered petitioners' claim that the class settlement was void. Opp. App. 1a-3a. Fractionators resumed these payments after the district court ruled on February 18. Nevertheless, Mull petitioned for a writ of mandamus seeking an order directing fractionators to make the payments that they were already making.[8]

8. The court of appeals consolidated the mandamus petition with the appeals and affirmed the order of the district court in an unanimous and forceful decision by Chief Judge Posner. After recounting the history of the factor concentrate litigation,[9] the court of appeals observed:

> [Petitioners] accuse the lawyers for the class and for the defendants—groundlessly, as far as we can tell—of defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hyprocrisy, hysteria, and Marxism. *Yet they did not oppose the settlement.* They objected initially to the amount of the settlement but their objection was rejected after a hearing and they did not renew their opposition or appeal from the consent decree, of which their clients have, as we noted, taken full ad-

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[3] Ironically, Mull now complains that fractionators improperly rushed payment to class members. Mull Pet. 20.

[9] The panel that heard this case (Posner, C.J., and Bauer and Rovner, JJ.) was well-acquainted with proceedings in *In re Factor VIII & IX Concentrate Blood Products Prod. Liab. Litig. (MDL-986)*, having ruled upon two previous mandamus petitions produced by the multi-district proceedings.

> vantage. And at no time did they object to the attorney's fee provision of the settlement.

Pet. App. 3 (original emphasis).

The court of appeals ruminated, in dicta, that the settlement "may well be questionable, both in its form . . . and its terms," Pet. App. 4,[10] but emphatically stated:

> [*T*]*here is no question of the district court's having exceeded its jurisdiction in entering the decree.* All the requirements of Article III were satisfied.
>
> Even if they had not been, it is unlikely that the settlement could be set aside at this late date. . . . The principle that jurisdictional defects may be noticed at any time is limited . . . by the equally important principle that litigation must have an end. *After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge.*

Pet. App. 4-5 (emphasis added). The court of appeals further held that, "[h]aving participated in the settlement proceeding and having failed to make timely objection to it, [petitioners] are barred by the principles of waiver and equitable estoppel from challenging the settlement after it has become final and the defendants have paid and the class members have received hundreds of millions of dollars." Pet. App. 7-8.

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[10] The court of appeals cited and distinguished *Amchem*, 521 U.S. 591, 591, 117 S. Ct. 2231, and characterized as "downright weird" the structure of the settlement, which paid identical sums to all claimant groups "even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly." Pet. App. 4. *But see* Pet. App. 70-71 (discussing outcome of cases tried prior to class settlement and strength of class members' claims).

The court of appeals also addressed petitioners' allegations of fraud, describing them as—

> fantastic and even preposterous. The most fantastic is the claim by one of them [Mull] that he was on the verge of negotiating a $1.8 billion settlement with the defendants when the class lawyers by a dastardly maneuver preempted him by agreeing to accept a measly $600 million. If this were true, which we do not for a moment believe, the lawyer would have been ethically obligated, as well as impelled by powerful motives of self-interest, to bring this to the attention of the district judge in the hearing that the judge conducted (and the lawyer attended) on the fairness of the settlement.

Pet. App. 7.

Finally, the court of appeals held that the district court had properly exercised its authority under the All Writs Act, 28 U.S.C. § 1651, in enjoining petitioners from attempting to enforce their contingent fee contracts or liens. The court of appeals called petitioners' claim that they were entitled to file suit in other jurisdictions "a dagger aimed at the heart of the settlement and therefore properly enjoinable." Pet. App. 8. The court stated that petitioners' attack on a settlement in which their own clients were participating "raises serious ethical concerns" and constituted a "sufficient danger" to their own clients to warrant the district court's injunction. Pet. App. 9. The court of appeals denied a petition for rehearing by Spece and Ibanez.

REASONS THE PETITIONS SHOULD BE DENIED

The petitions raise no issue worthy of this Court's review. Petitioners cite no authority—and there is none—for the proposition that they can represent clients participating in an enormous class settlement, lie to the district

court about their support for that settlement, and then, after the district court has entered final judgment approving the settlement, attack that judgment in order to evade the settlement's explicit fee provisions. Petitioners can indignantly cite Article III and *Amchem* until the end of time. But that does not change the fact that they are legally and equitably barred from attacking the judgment of the district court.

Even if petitioners were not barred, the jurisdictional and *Amchem* arguments that they attempt to raise are not properly presented here. As the district court and the court of appeals concluded, the record demonstrates that the district court had Article III jurisdiction. Petitioners' disagreement with that holding has no legal support and is, at best, a request for correction of putative error that petitioners could have raised before the judgment approving the class settlement became final. *Amchem* simply does not apply because it was decided after the final judgment that approved the factor concentrate class settlement. In any event, this settlement does not involve the conflicts in class interests at issue in *Amchem*. Approval of this settlement was within the discretion of the district court, and questions regarding the manner in which the court exercised its discretion are not an appropriate basis for reopening a final judgment.

Petitioners' remaining arguments are inherently fact-bound requests for correction of nonexistent errors. These claims do not warrant review by this Court and most certainly do not support a challenge to a final judgment that has already placed almost $600 million directly in the hands of settling class members.

I. Certiorari should be denied because the petitioners are barred from challenging the final judgment of the district court that approved the class settlement. Petition-

ers were actively involved in the multidistrict factor concentrate litigation and the process that led to final approval of the class settlement. Thomas Mull was a member of Plaintiffs' Steering Committee at the time the class settlement was negotiated and approved. FA 210-18, 709. He is listed as counsel on the class complaint and the motion filed by class counsel seeking final approval of the settlement. FA 455. A Mull colleague expressly told the district court that "they were not opposing the settlement" and "the settlement should go forward." FA 613, 630. Mull never objected to the fee provision that was an integral part of the class settlement agreement or suggested that his interests were in conflict with those of his clients. Pet. App. 12. Similarly, Spece and Ibanez participated in several hearings relating to the settlement without ever suggesting that it was void. Pet. App. 12. They complained that the cost and fee fund was too small, but they expressly waived that objection to the class settlement. Opp. App. 99a. Only after the settlement was final did these attorneys assert their outrageous fee demands and launch their attack on the settlement in an attempt to extort more money from fractionators. Petitioners' self-interested attack on the class settlement comes too late.

A. Mull argues that petitioners' bushwacking litigation tactics do not matter. According to Mull, petitioners are not bound by the final judgment approving the class settlement because they are not "parties" to the factor concentrate litigation. Mull asserts that the lower courts erred by "ignor[ing] the well established rule that no one is required to defend, or appear, in litigation unless named as a party." Mull Pet. 28. He asks this Court to grant certiorari to correct this error.

Not surprisingly, none of the cases cited by Mull supports the bizarre proposition that a final, judicially-

approved class settlement that includes specific provisions governing attorneys' fees does not bind attorneys who participated in the proceedings.[11] The fact that petitioners are not "parties" is irrelevant. As this Court has observed, nonparties can be bound by a judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996).

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[11] Most of the cases cited by Mull do not involve challenges brought by attorneys. *See Martin v. Wilkes*, 490 U.S. 755 (1989) (firefighters who failed to intervene in employment discrimination proceedings in which consent decrees were entered could subsequently challenge employment decisions made pursuant to those decrees); *Richards v. Jefferson County*, 517 U.S. 793 (1996) (taxpayers who did not participate in prior litigation over the constitutionality of county's occupation tax could challenge the alleged unconstitutional deprivation of their own property); *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 529-30 (1986) (consent decree between association of black and Hispanic firefighters and city could not "dispose of the valid claims" of nonconsenting labor union or "[impose] obligations" on it); *see also Rossi v. Boston Gas Co.*, 833 F. Supp. 62 (D. Mass. 1993) (without adequate proof that employee benefit plan had been served with process, plan was not a party properly before court in ERISA action); *Warnock v. Pecos County, Texas*, 116 F.3d 776, 778 (5th Cir. 1997) (incorrectly cited in Mull Petition as *Tank v. Southern Methodist Univ.*, 116 F.3d 775 (5th Cir. 1997)) (holding in case involving § 1983 claims brought by county auditor against state district judges there was no "privity between the county and the judges in their individual capacities").

The few cases involving attorneys do nothing to support petitioners. *See United States v. Schwimmer*, 968 F.2d 1570 (2d Cir. 1992) (appellate counsel could receive payment from court-controlled assets, pursuant to a stipulation with the government, after Schwimmer entered into a RICO Forfeiture Settlement Agreement with the government); *Fleming v. Lake Delton Dev. Co.*, 241 F.2d 865, 366 (7th Cir.), *cert. denied*, 355 U.S. 821 (1957) (district court could not extinguish attorney lien simply by mailing notice to the attorney, who had withdrawn from the case some time earlier and was no longer participating in proceedings); *Britton v. Seale*, 81 F.3d 602, 606 (5th Cir. 1996) (attorneys sued for malpractice not barred from contesting probate court order that transferred from deceased mother to her children any claims against profes-

Attorneys are officers of the court. When they appear before the court, they submit themselves to its inherent authority. *See Theard v. United States,* 354 U.S. 278, 281 (1957); *In re Orthopedic "Bone Screw" Prods. Liab. Litig.,* 132 F.3d 152 (3d Cir. 1997); *Skelton v. General Motors Corp.,* 860 F.2d 250 (7th Cir. 1988), *cert. denied,* 493 U.S. 810 (1989). Persons who have had the opportunity to litigate an issue before a court entered final judgment are barred from raising the issue on collateral attack. *Lambert v. Conrad,* 536 F.2d 1183, 1185 (7th Cir. 1976). This bar extends to jurisdictional challenges to a judgment. "It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n.9 (1982).

The doctrines of judicial and equitable estoppel also bar petitioners' attempt to play "fast and loose" with the courts and the parties.[12] *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.,* 81 F.3d 355, 360 (3d Cir. 1996); *see also DeGuiseppe v. Village of Bellwood,* 68 F.3d 187, 191 (7th Cir. 1995) ("courts are under no compulsion to heed the shifting theories of 'chameleonic litigants' "). Here, petitioners admitted to the district

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sionals where defendants were not parties to the probate proceeding and did not represent any parties at the time the court approved the assignment).

[12] Judicial estoppel bars a party who successfully takes a position in one case and obtains a favorable final judgment as a result from later assserting the opposite of that position. *See Kale v. Obuchowski,* 985 F.2d 360, 360-61 (7th Cir. 1993) (litigant could not assert that he owned property in bankruptcy proceedings, after having previously asserted that he did not own the property while negotiating a property settlement in divorce proceedings). The elements of equitable estoppel are misrepresentation, reasonable reliance, and detriment. *FDIC v. Rayman,* 117 F.3d 994, 1000 (7th Cir. 1997); *Cange v. Stotler & Co.,* 826 F.2d 581, 585 (7th Cir. 1987).

court that "they *knew from the beginning*, even while they were urging the court to approve the settlement, that they would attack the limitation on attorneys' fees" and "contend that the 'settlement only' class was invalid." Pet. App. 20-21 (original emphasis). The district court concluded that petitioners' "conduct is a classic example of behavior which invokes the doctrine of equitable estoppel. By their affirmative acts and their silence when there was clearly a duty to speak, they intentionally mislead *everyone* in the case—the defendants, the class counsel, the court and their own clients—into believing that they approved of the settlement, including the limitation on attorney's fees." Pet. App. at 11-12 (original emphasis). *Accord* Pet. Opp. 7-8 (court of appeals opinion).

Mull argues that plaintiffs' attorneys were foreclosed from objecting to the settlement because they had a conflict of interest: the settlement was good for their clients, but bad for attorneys because it deprived them of their right to collect their contingent fees. *See* Mull Pet. 27. However, no ethical dilemma is created by a settlement proposal that does not award plaintiffs' attorneys their full fee expectations. This Court has held that even a settlement offer conditioned upon a waiver of attorneys' fees does not present an ethical dilemma "in the sense that [the attorney] had to choose between conflicting duties under the prevailing norms of professional conduct." *See Evans v. Jeff D.*, 475 U.S. 717, 727 (1986) (upholding settlement in civil rights case conditioned upon waiver of statutory attorneys' fees). The attorney must evaluate the settlement based on the clients' interests and may not thereafter seek to reform the settlement to obtain more money for himself. *Evans*, 475 U.S. at 741.[13]

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[13] Mull attempts to distinguish *Evans* by arguing that it was a statutory fee shifting case in which the fee belongs to the client, as opposed to a contingent fee case, in which Mull assserts that the

Moreover, even if the class settlement created a genuine conflict of interest—and it did not—petitioners were not entitled to remain silent. They were under a duty to tell the district court about the putative conflict before final judgment was entered. *See* Model Rules of Professional Conduct Rule 1.7 comment 2 (1995) (if conflict arises after representation has been undertaken, attorney should seek permission to withdraw from representation). Further, petitioners cannot rely on the purported conflict, which relates only to attorneys' fees, to excuse their failure to raise jurisdictional and other challenges that they now claim precluded settlement on a classwide basis.

In short, by their own conduct, petitioners are foreclosed from raising on collateral attack arguments that should have been raised before the final judgment was entered in this case. Certiorari should therefore be denied.

B. Petitioners Spece and Ibanez try to avoid the bar to their arguments by asserting that this case presents an important issue about "when attorneys fees issues are to be reviewed." Spece Pet. 20.[14] As the court of appeals

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fee belongs to the lawyer. Mull Pet. 27. However, attorneys do not have an absolute right to recover contingent fees. *See Krause v. Rhodes*, 640 F.2d 214, 219-20 (6th Cir.) (affirming district court approval of a settlement that limited attorney's fee recovery to $75,000), *cert. denied*, 454 U.S. 836 (1981). More specifically, they are not entitled to sign up large numbers of potential claimants "to secure for themselves huge attorneys' fees under individual contingency fee contracts that bear little or no relation to the actual work to be done or the risks in the case." *In re A.H. Robins Co., Inc.*, 182 B.R. 128, 138 (E.D. Va. 1995) (internal citation omitted), *aff'd*, 86 F.3d 364 (4th Cir.), *cert. denied*, 519 U.S. 993 (1996).

[14] Spece and Ibanez contend that this case presents the identical issue before the Court in *Cunningham v. Hamilton County Ohio*, No. 98-727, in which this Court will decide whether an attorney may seek interlocutory review of an order imposing sanctions. Spece Pet. 20. Spece and Ibanez also cite a purported conflict between the Third and Fifth Circuits regarding the timing for appeal-

recognized, the establishment of the $40 million cost and fee fund as the exclusive source for payment of attorneys' fees was one of the integral provisions of the class settlement. Pet. App. 5. Petitioners chose not to appeal that final judgment, which explicitly found the fund to be reasonable and fair to the class. Pet. App. 79-80. There is nothing about their tactical decision that would warrant a grant of certiorari.

II. Even if petitioners' collateral attack were not legally and equitably barred, none of their claims would warrant review. Petitioners contend primarily that the class settlement was a fraud perpetrated by fractionators in order "to manufacture federal jurisdiction over a national 'in globo' settlement" in order to "abrogate the class members' contracts with their attorneys and divert those fees to the [Plaintiffs'] Steering Committee." Mull Pet. 15; *see also* Spece Pet. 17-19. Petitioners have jumbled together jurisdictional and Rule 23 analysis in an attempt to justify raising these arguments on collateral attack. The record does not support their wild allegations of fraud.

A. As the court of appeals concluded, "[a]ll the requirements of Article III were satisfied" with respect to the final judgment approving the class settlement. Pet. App. 4. It cannot be disputed that a genuine controversy exists between HIV-infected hemophiliacs and fractionators. The class settlement was negotiated and approved in the context of multidistrict litigation that had been underway since 1993. *In re Factor VIII & IX Concentrate Blood Products Prod. Liab. Litig. (MDL-986)*, 853 F. Supp. 454 (J.P.M.L. 1993). That litigation was hotly

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ing a fee award against one defendant when there has been a Rule 54(b) judgment as to that defendant. Spece Pet. 22. These cases are obviously inapposite.

contested. As the district court observed in approving the final settlement, "[t]he docket is over 70 single-spaced pages, one indicator of the extent of this controversy." App. Pet. 72. Dozens of hearings and pretrial conferences had been held and the court had ruled upon numerous contested issues, including almost 100 discovery motions. Pet. App. 72. Fractionators had twice filed petitions for writs of mandamus challenging orders of the district court. One of these petitions led to decertification of a "negligence issue" class. *In re Rhône-Poulenc Rorer Inc. ("RPR")*, 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).[15] There can be no question here as to the vigorousness with which the factor concentrate litigation had been conducted or the adverse postures of fractionators and PSC. Pet. App. 19.

The complaint in the class action asserted that fractionators were liable under a number of negligence and strict liability theories. FA 377-93. Fractionators answered denying those claims. *E.g.*, FA 458-517. The settlement proposal negotiated by fractionators and PSC was not, as petitioners allege, a fait accompli presented for the district court to rubber stamp. *See supra*, at 5-9. After conditionally certifying the class, the court held two hearings to determine whether the proposed settlement was fair to class members. FA 518, 601. The district court stated that it would reject the class settlement if fractionators were unable to resolve most government and insurer reimbursement claims against class members, deferred a final determination on class certi-

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[15] The other mandamus petition challenged a district court order relating to the number of common-issue expert witnesses upon which fractionators can call in individual trials after remand. That petition was denied. *In re Rhône-Poulenc Rorer Inc.*, No. 97-3535 (7th Cir., March 11, 1998).

fication for months pending resolution of those issues, and even entered an order stating that it would deny certification if those issues were not resolved by a particular date. FA 572-82. If the class had not been certified and the settlement approved, fractionators and plaintiffs' counsel then would have litigated this case, just as they are litigating hundreds of other cases in the MDL and in state courts.

Petitioners nevertheless assert that there was no case or controversy because the parties had reached a tentative settlement agreement before the complaint was filed. Mull Pet. 15-16. If that were the law, courts would lack jurisdiction over most consent decree litigation. *See SEC v. Randolph*, 736 F.2d 525, 527 (9th Cir. 1984) (reversing district court judgment "holding that no case or controversy existed because the parties arrived in court with the proposed judgment in hand"). Courts also would lack jurisdiction to approve settlements in cases that had been litigated for years; under petitioners' theory, courts overseeing such cases would lose jurisdiction the moment the parties came to terms. "The fact that the parties have arrived at a settlement agreement, however, does not lead inevitably to the conclusion that no controversy exists between the parties up to the time the judgment is entered." *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 640 (2d Cir.) (holding consent judgment was entitled to res judicata effect), *cert. denied*, 484 U.S. 992 (1987).[16]

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[16] The cases cited by Mull are inapposite. *See Moore v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 47, 48 (1971) (no case or controversy when both sides argue that a statute is constitutional); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (declaring unconstitutional legislation that purported to confer jurisdiction on certain courts to determine the validity of certain congressional legislation); *Cleveland v. Chamberlain*, 66 U.S. 419 (1861) (no case or controversy where appellant had acquired substantially all of

Petitioners also argue that the district court lacked jurisdiction because class representative Susan Walker stated at the final fairness hearing that approval of the class settlement was desirable because it would provide compensation to persons like herself whose claims were time-barred. Mull Pet. 22; Spece Pet. 16. This has nothing to do with the Article III case or controversy requirement. If a defendant prevails on a motion for summary judgment on limitations grounds, the plaintiff's case is dismissed; the court does not lose jurisdiction. Therefore, the possibility that defendants could have asserted limitations as an affirmative defense against Walker did not deprive the district court of jurisdiction.[17]

B. Ultimately, petitioners' Article III argument collapses into their *Amchem* claim: they contend that the district court lacked jurisdiction because the class settlement fails to meet the standards established by this Court in *Amchem*, 521 U.S. 591, 117 S. Ct. 2231. Fractionators have four responses:

(1) *Amchem* was not decided on the basis of jurisdiction; it was decided on the basis of Rule 23. This Court specifically declined to address the Article III arguments

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appellee's interest and control of the debt disputed in the litigation); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (district court's entry of judgment in favor of named plaintiffs did not moot their private case or controversy); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 54 (1997) (no case or controversy once state employee challenging Arizona's English-only law resigned state position); *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (no justiciable constitutional question absent showing that statutes would be enforced against plaintiffs).

[17] Petitioners also argue that Walker was an inadequate class representative because she was susceptible to a limitations defense. Mull Pet. 22. Here, the susceptibility of Walker's claim to a limitations defense made her typical of the settlement class. Pet. App. 70.

raised by petitioners. *See Amchem*, 117 S. Ct. at 2244. Petitioners assert that the Court may reach those arguments in *Ortiz v. Fibreboard*, No. 97-1704, and that the present case should be held pending that decision. But the outcome of *Ortiz* will not control here. In *Ortiz*, this Court is reviewing an appellate court judgment entered in a direct appeal brought by dissatisfied class members—not a collateral attack by dissatisfied attorneys.

Even if *Ortiz* were to articulate a new jurisdictional rule governing class settlements, that result would not warrant a grant of certiorari here. As the court of appeals stated: "After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge." Pet. App. 5 (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938)). *See also Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Assoc.*, 455 U.S. 691, 706 & n.13 (1982); *Durfee v. Duke*, 375 U.S. 106, 113 (1963). Any new jurisdictional rule established in *Ortiz* could not retroactively establish "an egregious want of jurisdiction" two years ago, when final judgment was entered approving the factor concentrate class settlement.

(2) Petitioners do not have standing to argue—as they do—that certification of the settlement class violated the rights of class members under *Amchem*. A litigant may represent the rights of a third party only when those interests are similar. *See Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). Here, complaining attorneys are seeking to destroy the class settlement in which many of their clients are participating. Petitioners are representing themselves—not class members.

(3) To the extent that *Amchem* established new law governing class settlements, it does not apply to this case because *Amchem* was decided after final judgment was entered approving the class settlement. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 95 (1993).[18]

(4) If *Amchem* applied here and petitioners had standing, certiorari should not issue to revisit the factor concentrate class settlement. As the district court concluded, this class settlement is fundamentally different from the putative class settlements in *Amchem* and *Ortiz*. Pet. App. 19. Here, the interests of one group of class members are not being sacrificed in favor of others. All eligible class members who follow the procedures for obtaining settlement payments are receiving substantial compensation—$100,000 for each claimant group. FA 8 § B. Persons who preferred to opt out and pursue individual litigation have done so without prejudicing their own interests. FA 18 § C(3)(e), 26 § F. No "futures problem" is presented because hemophiliacs who used factor concentrates during the early 1980s now know (or have it within their power to determine) whether they are HIV positive.

It is, of course, possible to question, as Judge Posner apparently does, the manner in which the settlement was structured. Pet. App. 4. Fractionators firmly believe that approval of the settlement fell squarely within the scope

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[18] Petitioners erroneously assert that fractionators "admi[tted] to this Court in their *amicus* filing in *Amchem* that affirmance of the Third Circuit's *Georgine* decision would invalidate the then pending *Walker* class." Mull Pet. 22; *see* Spece Pet. 4 n.1. Fractionators actually argued that the pending factor concentrate class settlement would be foreclosed if this Court adopted the Third Circuit rule that a class could be certified for settlement only if the class could have been certified for litigation. *Amchem* subsequently rejected that aspect of the Third Circuit's reasoning. 117 S. Ct. at 2243, 2248.

of the district court's discretion. *See Califano v. Yamanski*, 442 U.S. 682, 703 (1979). However, the question of whether the district court properly exercised its discretion is inherently factbound and does not merit review. That is particularly true here, where the judgment approving the settlement is final and virtually all class members have been paid.

C. To bolster their argument that district court jurisdiction was manufactured through fraud, petitioners make wild assertions about the settlement negotiations, the proceedings in the district court, and the manner in which settlement monies have been paid. *E.g.*, Mull Pet. 4-5, 7, 19-20; Spece Pet. 6-7, 8-10. Petitioners egregiously misrepresent the proceedings. Many of their allegations are unsupported by record citations. The court of appeals found petitioners' allegations of fraud to be "fantastic and even preposterous." Pet. App. 7; *see also* Pet. App. 3. The district court had already removed Mull from PSC for misleading class members with such allegations. FA 701-06, 709-709c. Petitioners' attempt to rewrite the history of this litigation does not deserve review by this Court.

D. Finally, petitioners allege that the releases sent to class members depart from the terms of the settlement agreement. The settlement agreement expressly provided that claimants would be required to sign releases in order to receive payment. FA 41 § M. Nevertheless, Mull points to the releases as evidence that fractionators used the cover of the class settlement to enter into thousands of individual settlements with class members. Mull Pet. 7-8. Spece and Ibanez claim that the releases actually deprive class members of consideration promised in the settlement agreement. Spece Pet. 24-27.

For the reasons stated above, petitioners do not have standing to raise these arguments. *See supra*, at 26.

Moreover, the interpretation of settlement documents is within the discretion of the district court. *In re VMS Sec. Litig.*, 103 F.3d 1317, 1321 (7th Cir. 1996) ("Given that the power to implement a settlement agreement between the parties inheres in the district court's role as supervisor of the litigation, the exercise of that power is particularly appropriate for deferential review"). The district court carefully reviewed the terms of the releases, the settlement agreement, and the final judgment approving the class settlement, and concluded that the releases were consistent with the settlement. Pet. App. 22-26.[19] The court of appeals did not find it necessary to address

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[19] The district court rejected the argument that paragraph 14 of the release shows that fractionators abandoned the class settlement. Paragraph 14 simply states that the claimant "would agree to the terms of this Release *even if* the Agreement were not part of a class settlement but rather a completely private settlement." FA 67 ¶ 14 (emphasis added). The conditional phrasing demonstrates that fractionators were not abandoning the class settlement. They merely sought protection from claimants who might collect the $100,000 class settlement payment and then attack the settlement in an attempt to obtain more money (a maneuver not unlike that attempted by petitioners).

The district court also rejected the argument that class members received less than promised under the settlement because the release waives claims against the United States and the states, a provision not contained in the settlement agreement. The United States insisted on this provision as a condition for releasing its subrogation claims against claimants. *See* FA 162, 175 at 6, § (b)(3) & App. A. Resolution of subrogation issues was a make-or-break concern for the class settlement and was specifically addressed in the notice and settlement agreement. *See* FA 572-82; FA 59; FA 46 § P. The district court found that the release provisions were "altogether consistent with the intent of the settlement agreement and cannot be regarded as a departure from its terms." Pet. App. 22. No class members objected to the waiver. Pet. App. 23. Rather, as the district court observed, "[t]he only objectors are Mull-Kozak and Spece-Ibanez, who seek to parlay the release requirement into a benefit for themselves. They completely ignore the fact that what they seek would be a substantial detriment to the class." Pet. App. 23.

petitioners' arguments about the release. Those arguments are factbound and do not merit this Court's review.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

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